(3)

No. 91-836

FILED
FEB 10 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In re GRAND JURY PROCEEDINGS:
UNION BANK OF SWITZERLAND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNION BANK OF SWITZERLAND'S REPLY TO BRIEF IN OPPOSITION

JOHN W. DICKEY
125 Broad Street
New York, New York 10004
(212) 558-4000
Counsel for Petitioner

DAVID A. HEINER, JR.
ROBERT J. GIUFFRA, JR.
THOMAS J. WITT
SULLIVAN & CROMWELL

MARTIN R. RASKIN,
RASKIN & RASKIN, P.A.
Of Counsel

February 10, 1992

Rule 29.1 Statement

The subsidiaries and affiliates of petitioner Union Bank of Switzerland, other than wholly-owned subsidiaries, are listed below:

Argor-Heraeus AG, Mendrisio
Banca Internazionale Lombarda, Milan
Bank Cantrade Ltd.
Bank Rohner Ltd.
Banque Fédérale Société de Participation et Financement
Cantrade Participation Ltd.
CS (Cantrade Securities) Investment, London
Financière Fransad, Geneva
HypoSwiss Swiss Mortgage and Commercial Bank
Institut für Automation, Zurich
Intrag Deutschland GmbH, Frankfurt am Main
Intrag International Bond Invest, Luxembourg
Intrag International S.A., Luxembourg
Intrag Ltd., Management of Investment Trusts
Klinik Hirslanden AG, Zurich
Kredit-und Handelsbank Lyss
Motor-Columbus AG, Baden
National Versicherung AG, Basle
PBZ Privatbank Zurich
Perutil, Panama
Saudi-Swiss Bank
Thesaurus Continental Securities Corporation
Zur Schanzenbrücke AG

TABLE OF AUTHORITIES

Page(s)

Cases

Bowen v. *American Hospital Association*, 476 U.S. 610 (1986) 5

Compagnie Française d'Assurance Pour le Commerce Exterieur v. *Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984) 2-3

First National City Bank of New York v. *Internal Revenue Service*, 271 F.2d 616 (2nd Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) 2

Green v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989) 5

Ings v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960) 2, 4

In re Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962) 9

In re Sealed Case, 825 F.2d 494 (D.C. Cir.), *cert. denied*, 484 U.S. 963 (1987) . . . . . *passim*

Page(s)

In re Westinghouse Electric Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977) 2

Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. *Rogers*, 357 U.S. 197 (1958) 3

United States v. *Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) . . . . . *passim*

United States v. *Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) . . . . . *passim*

United States v. *Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976) 3

United States v. *First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983) 3, 6, 8, 9

United States v. *First National City Bank*, 396 F.2d 897 (2d Cir. 1968) 2

Page(s)

United States v. *First National City Bank*,
379 U.S. 378 (1965) 8

United States v. *Vetco Inc.*,
691 F.2d 1281 (9th Cir.), *cert. denied*,
454 U.S. 1098 (1981) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NO. 91-836

In re GRAND JURY PROCEEDINGS:
UNION BANK OF SWITZERLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

UNION BANK OF SWITZERLAND'S REPLY TO BRIEF IN OPPOSITION

This petition presents for review issues of undeniable importance to courts, prosecutors, foreign states and the international banking community. The Government resists *certiorari*, nevertheless, on the ground that the circuits are not divided on the central question: whether or in what circumstances, if any, a U.S. court may compel a neutral custodian of documents to disclose them to a U.S. grand jury in violation of the laws of the foreign state in which the documents are located. With respect, the Government's position is simply wrong, as we show herein.

1. Decisions of the circuit courts, and the Government itself in this very proceeding, flatly contradict the claim that the circuits are not divided on the question presented for the Court's

review. As well stated by the D.C. Circuit in a *per curiam* opinion of Judges Wald, Mikva and Bork:

> "[t]he federal courts have disagreed about whether a court may order a person to take specific actions on the soil of a foreign sovereign in violation of its laws and about what sanctions the court may levy against a person who refuses to comply with such an order."

In re Sealed Case, 825 F.2d 494, 497 (D.C. Cir.), *cert. denied*, 484 U.S. 963 (1987).[1]

The D.C. Circuit went on to describe cases from the Second, Ninth, Tenth and Eleventh Circuits, showing the contrary approaches to the issue taken by those courts:

> "A line of older Second Circuit cases takes the position that a court should not order violations of foreign law on foreign territory. *See United States* v. *First Nat'l City Bank*, 396 F.2d 897, 901-02 (2d Cir. 1968); *Ings* v. *Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960); *First Nat'l City Bank of N.Y.* v. *IRS*, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 . . . (1960). Other cases distinguish between a court's ability to order a person to produce documents in contravention of foreign law, which is thought to be acceptable, and its ability to impose sanctions for disobedience to that order, which is thought to be much more problematic. *See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts*, 563 F.2d 992, 996-99 (10th Cir. 1977); *Compagnie Française d'Assurance Pour le Commerce Exterieur* v. *Phillips Petroleum Co.*,

---

[1] The question presented here was not raised by the petition filed in *In re Sealed Case*.

> 105 F.R.D. 16, 26-36 (S.D.N.Y. 1984); *cf. Societe Internationale* v. *Rogers*, 357 U.S. 197, 204-13 (1958). Two recent Eleventh Circuit cases, however, indicate that court's willingness to approve civil contempt orders and accompanying sanctions that seek to compel a person to violate foreign secrecy laws by producing documents that are located on foreign soil. *See In re Grand Jury Proceedings (the Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 . . . (1985); *In re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 . . . (1983); *cf. United States* v. *Vetco Inc.*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 . . . (1981)."

In re Sealed Case, 825 F.2d at 497-98. The Seventh Circuit likewise has observed that "the Eleventh Circuit has reached a different result in a case involving [the production of foreign bank records from] a bank which was apparently a neutral source of information, as here." *United States* v. *First National Bank of Chicago*, 699 F.2d 341, 346-47 (7th Cir. 1983).

In the Eleventh Circuit, the controlling principle is this: "the vital role of a grand jury's investigative function to our system of justice . . . outweigh[s] the [foreign nation's] interest in protecting the right of privacy incorporated in its bank secrecy laws. . . . [W]e are not willing to emasculate the grand jury process." *Bank of Nova Scotia I*, 691 F.2d at 1391; *see also United States* v. *Field*, 532 F.2d 404, 407-09 (5th Cir. 1976). Thus, in holding UBS in contempt here, the district court held that Eleventh Circuit law "is as straight as an arrow on this subject. . . . [T]he one impediment to compliance is that you will have to violate Panamanian law. And that is not sufficient under *Nova Scotia* to relieve you from compliance with the court order." (A6-A7.)

The D.C. Circuit rejected the Eleventh Circuit's rule in *In re Sealed Case*. The D.C. Circuit "recognize[d] that the grand jury's investigation may . . . be hampered, perhaps significantly," but concluded that "we are unable to uphold the contempt order against the bank." 825 F.2d at 499; *see also Ings* v. *Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960).

If the foregoing leaves any doubt that a split exists, it is put to rest by the Government. In its brief below, the Government cited *In re Sealed Case* as *contra* authority to *Bank of Nova Scotia*. Brief for the Appellee, *In re Grand Jury Proceedings*, No. 91-5522 (11th Cir. 1991) ("Brief for the Appellee") at 14.

2. The split between the circuits cannot be reconciled on the Government's theory that the D.C. and Eleventh Circuits both employ a flexible "balancing" test to analyze the question presented, but simply come out differently having applied that test. Brief for the United States in Opposition ("Gov't Opp.") at 7-8, 11-12.

The Government's theory is contradicted by its own arguments made in the course of the proceedings below. At the very outset, the Government warned petitioner's counsel that *any* motion by UBS to obtain judicial review of the subpoena served upon it would be nothing short of "frivolous[] . . . in the face of *Bank of Nova Scotia*."[2] Then, in the Eleventh Circuit, the Government stated that arguments as to "international comity . . . . have already been considered and rejected . . . in the *Nova Scotia* cases, and need not be reexamined here." Brief for the Appellee at 20-21, 15-16. According to the Government:

> "It does not serve the interest of justice to require district courts in every case in which foreign bank records are subpoenaed to conduct

---

[2] Letter of Assistant U.S. Attorney Mark D. Seltzer to John Dickey, dated February 25, 1991, annexed as Exhibit B to the affidavit of Dr. Urs Philipp Roth, sworn to March 7, 1991.

> plenary, time consuming examinations of those factors in cases indistinguishable in operative facts from the *Bank of Nova Scotia* cases."

Id. at 7-8.

Of course, the facts in this case *are* vividly distinguishable from those in the *Bank of Nova Scotia* cases in almost every respect relevant to a reasoned comity analysis. *See* UBS's Petition for a Writ of Certiorari at p. 11 n.8. The only "indistinguishable" facts are that the cases involve foreign banks holding documents abroad that a U.S. grand jury has subpoenaed. What the Government meant was that where foreign bank records are subpoenaed by a U.S. grand jury, they *must* be disclosed regardless of any other fact. In the Government's words, the "defense" of foreign illegality simply is not "a valid objection for complying with a grand jury subpoena." Brief for the Appellee at 15.

The courts below followed the "straight as an arrow" course urged by the Government. Citing *Bank of Nova Scotia I* as "dispositive," the district court made *no* findings as to any facts relevant to a comity analysis and denied UBS's motion for an evidentiary hearing. (A8-A9.) At the contempt hearing, the district court ruled that proof of prohibitory foreign law could not excuse compliance with a subpoena *no matter what the facts and circumstances*. (A6.) The Eleventh Circuit then summarily affirmed[3] on the ground that the district court's denial of UBS's motion to quash and its imposition of contempt sanctions were

---

[3] This Court regularly issues writs of certiorari in cases in which an appellate court has summarily affirmed, without opinion, a decision of a trial court. *See, e.g., Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989); *Bowen* v. *American Hospital Ass'n*, 476 U.S. 610 (1986). Moreover, since the Eleventh Circuit accepted the district court's statement of the "dispositive" principle of *Bank of Nova Scotia* — foreign law is not a defense to a grand jury subpoena — a further opinion was unnecessary.

"without an error of law" and "an opinion would have no precedential value." 11th Cir. Rule 36-1.[4]

In summary, no "balancing" at all was done by the courts below. The balancing had been done, once and for all, in the *Bank of Nova Scotia* cases. None of the factors relevant to the comity analyses commonly conducted in other circuits was considered and no findings were made as to any such factors. That is because, in the Eleventh Circuit, *no* facts need be found if a U.S. grand jury subpoenas documents from abroad. As a matter of law the documents must be produced or sanctions will be imposed upon the neutral custodian of documents, whatever the true needs of the grand jury, whatever the prohibitions of foreign law, whatever the consequences of the violation of foreign law to the custodian, and whatever the alternative means available to the Government — customer consent, formal or informal legal assistance or otherwise — to obtain the information.

In other words, in the Eleventh Circuit the grand jury subpoena outweighs all competing factors. In the Eleventh Circuit the "balancing test" accepted and applied in other circuits has been reduced to an absolute rule of law.

3. The petition in this case squarely raises the important issues of international comity created by conflicts between foreign privacy laws and U.S. discovery procedures. All of the traditional elements of comity analysis are present: an innocent, disinterested holder of documents, a governing foreign law prohibiting disclosure, a grand jury subpoena requiring disclosure, sanctions under the foreign law for unauthorized disclosure, contempt sanctions under U.S. law for nondis-

---

[4] As to circuit conflict, it should be noted that in *First National Bank of Chicago*, the Seventh Circuit reversed an order granting enforcement of an IRS subpoena, holding that it was "an abuse of discretion to enter an unqualified order compelling production, particularly where there is no indication of the rationale of the decision." 699 F.2d at 345.

closure, and alternative means of obtaining information sought by the grand jury.

The Eleventh Circuit disagrees fundamentally with the D.C. Circuit and other circuits even as to *whether* such factors are to be addressed in determining if disclosure will be ordered.[5] The Eleventh Circuit rule is absolute. Foreign prohibitory law is no defense to a U.S. subpoena. In practical effect the judicial inquiry is over once an Assistant U.S. Attorney causes a grand jury subpoena to be issued. No further facts need be considered. No further inquiry need be made. The consequences to the non-party document custodian are irrelevant. The availability of alternative procedures to obtain disclosure is of no concern.

In the D.C. Circuit, it is relevant that "[t]he government may find alternative means" to collect information from the foreign bank. *In re Sealed Case*, 825 F.2d at 499. In the Eleventh Circuit, however, "[t]he government does not have to pursue alternative procedures to obtain these documents." (A6.) Thus, the courts below never addressed UBS's claim that the Government could obtain bank records of UBS (Panama) by alternative means without requiring UBS (Panama) to commit a crime and expose its officials to jail terms.[6]

---

[5] Even among the circuits that do accept comity analysis, there is disagreement as to how the various interests implicated by subpoenas seeking documents from foreign nations in violation of foreign law should be analyzed and as to the appropriateness of contempt sanctions when innocent third parties are caught between the conflicting demands of competing sovereigns. *See In re Sealed Case*, 825 F.2d at 497-98.

[6] The Government seeks to intrude a factual issue into this proceeding as to the efficacy of those alternative nonconfrontational means of obtaining the information it desires. (Gov't Opp. at 13-14.) But that is not the issue before this Court. The issue here is the *legal* question *whether* the availability of alternative means is even a factor to be considered in determining whether to enforce a U.S. grand jury subpoena in the face of conflicting foreign law.

The Seventh Circuit has held that the "extent and nature of [the] hardship" imposed on the bank "bears great weight." 699 F.2d at 345. The Eleventh Circuit, on the other hand, has repeatedly declared that by choosing to do business in more than one nation, third parties assume "the incidental risk of occasional inconsistent governmental actions." 740 F.2d at 828; *see also* 691 F.2d at 1391. As the district court put it, "You have to choose between the United States, to be obedient to our laws or be obedient to Panamanian laws." (A6.) The district court thus did not make any findings as to the threat of criminal prosecution if UBS (Panama) discloses the subpoenaed records. The Government submitted no evidence as to the prohibitions of Panamanian law, and its untested suppositions, repeated before this Court, must be disregarded. Indeed, the only evidence in the record (the unchallenged affidavit of a leading expert on Panamanian banking law, Dr. Gabriel Castro Suarez) establishes that UBS (Panama) and its directors and officers face criminal prosecution — and possible jail terms for the individuals — if the records are disclosed.

The D.C. Circuit considers it "[m]ost important" that contempt "sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign *on that sovereign's own territory.*" 825 F.2d at 498 (emphasis added). The Seventh Circuit has also found it significant that "the critical act of initially conveying the information would take place [in a foreign state.]" *First National Bank of Chicago*, 699 F.2d at 345. In the Eleventh Circuit, however, courts do not accord any weight to "the situs of the records." 740 F.2d at 828 n.17. Furthermore, the courts below placed no emphasis upon the fact that they lacked jurisdiction over UBS (Panama), the Panamanian national ordered to violate Panamanian law in Panama. In *United States* v. *First National City Bank*, 379 U.S. 378 (1965), it was noted that "[u]se of judicial equity powers to coerce a party over whom the court has no jurisdiction or likelihood of obtaining jurisdiction is unheard of." *Id.* at 389 (Harlan, J., dissenting).

As to the above elements it is appropriate and timely for this Court now to consider whether and to what extent they are to be examined in weighing the demands of U.S. agencies for extraterritorial discovery against the policies and laws of foreign sovereigns.

4. The government attempts to distinguish *In re Sealed Case* and *First National Bank of Chicago* from this case by challenging UBS's "good faith." (Gov't Opp. at 9-10.)[7] However, this argument is beside the point because the district court did not deem UBS's good faith to be of any relevance whatsoever and made no finding on the point:

> "The fact that you have made every effort is not enough according to case decisions. . . . It doesn't just mean in good faith. It means every single effort that you can make to comply and the one impediment to compliance is that you will have to violate Panamanian law. And that is not sufficient under Nova Scotia to relieve you from compliance with the court order." (A6-A7.)

---

[7] The sole basis advanced for the Government's claim that UBS has not acted in "good faith" is that UBS (Panama) did not approach the law enforcement authorities in Panama to seek permission to commit a crime in Panama. However, the D.C. Circuit did not require the foreign bank involved there to seek permission to commit a crime. To the contrary, the D.C. Circuit observed that "[t]he executive branch may be able to devise alternative means of addressing this problem, but the bank cannot." 825 F.2d at 498. *See also In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (demonstrating "good faith" requires only that the bank "cooperat[e] with the Government when and if the Government seeks to obtain the records by application to the Panamanian authorities"). As to UBS's "good faith," the record demonstrates that UBS has acted throughout expeditiously and straightforwardly, attempting at every step to work with the Government to obtain customer or official Panamanian consent to the release of the documents. *See* Brief of Appellant Union Bank of Switzerland, *In re Grand Jury Proceedings*, No. 91-5522 (11th Cir. 1991) at 8-10, 13-14.

The Government's final effort to distinguish *In re Sealed Case* is based on the ground that the foreign bank there was owned by a foreign government. (Gov't Opp. at 9.) However, a bank owned by a foreign government is likely in a better position than a private bank to avoid criminal penalties for violating the law of the foreign state that owns it.

CONCLUSION

The circuits disagree over whether or when a U.S. court, by threat of sanctions, may compel an innocent third party to violate foreign law in order to comply with a subpoena of a U.S. grand jury or other agency. The Court should grant certiorari to address "the difficulties and uncertainties that now pervade this area of law." *In re Sealed Case*, 825 F.2d at 499.

Respectfully submitted,

JOHN W. DICKEY
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner
Union Bank of Switzerland

DAVID A. HEINER, JR.
ROBERT J. GIUFFRA, JR.
THOMAS J. WITT

SULLIVAN & CROMWELL

MARTIN R. RASKIN

RASKIN & RASKIN, P.A.

Of Counsel

February 10, 1992